Filed 12/15/09 In re Q.M. CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re Q.M., a Person Coming Under the Juvenile Court Law.	
ALAMEDA COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. BRIAN B., Defendant and Respondent; JOHANNA M. et al., Intervenors and Appellants.	A123399 (Alameda County Super. Ct. No. 0J06-004142)

The statutory scheme governing juvenile dependency proceedings requires dependency courts to return dependent minors to their parents after 18 months of reunification services unless doing so would cause a substantial risk of detriment to the minor. In the present case, the dependency court found that no such risk had been demonstrated. The court therefore ordered that custody of the minor be transferred to the minor's father from her maternal grandparents and de facto parents, who had been the minor's primary caretakers since her birth.

The maternal grandparents appeal, arguing that the trial court erred in finding lack of detriment, because the minor was more attached to them than to her father. We conclude that substantial evidence supported the dependency court's finding that there

was no risk of detriment to minor from being placed in father's custody. We therefore affirm.

FACTS AND PROCEDURAL BACKGROUND

The minor who is the subject of this dependency proceeding, Q.M. (minor), was born in July 2002 to parents who were not married to one another. While minor's mother J.M. (mother) was pregnant with minor, she obtained a domestic violence restraining order against minor's father Brian B. (father), although he denied hitting her and was not criminally charged. Mother apparently discontinued her relationship with father by the time minor was born.

Minor was raised by mother and mother's parents (grandparents), and lived in grandparents' home, until December 2005.[1] Meanwhile, in July 2003, when minor was about one year old, father was granted visitation with minor by the family law department of the Alameda County Superior Court.

Mother moved with minor to Contra Costa County for a brief period in late 2005 through early 2006. Apparently, mother was in an abusive relationship with another man at that time, from which she was seeking to escape. In March 2006, grandparents petitioned the probate court in Contra Costa County for guardianship of minor, but the petition was denied due to the pendency in Alameda County of the family law proceeding concerning minor. Nonetheless, minor was placed in grandparents' custody at that time on a police hold. On April 3, 2006, grandparents were given temporary guardianship by the probate court in Alameda County. The following day, maternal grandmother attended a mediation with father and his mother (paternal grandmother), and the parties agreed that minor would remain with grandparents pending further proceedings, subject to father's existing visitation under the order from the family court in Alameda County.

From March 2006 on, minor's primary residence remained with grandparents, and father continued to have visitation with her, which increased over time. During overnight

[1] Mother is not a party to this appeal. Although technically a respondent on this appeal, the Alameda County Social Services Agency (the Agency) did not file a brief. The respondent's brief was filed by minor's father (father).

visitations with father, minor usually stayed with father at the home of paternal grandmother. This arrangement was still in effect when the dependency court made the order from which the present appeal was taken.

On April 14, 2006, the Alameda County probate court declined to continue grandparents' guardianship. Accordingly, for minor's protection, a formal dependency proceeding was initiated in Contra Costa County on April 25, 2006, based on allegations regarding mother's homelessness, substance abuse, and mental health problems. On May 11, 2006, grandparents sought de facto parent status as to minor, but the request was denied without prejudice on June 7, 2006.

The minor was adjudicated a dependent on May 24, 2006. With the consent of mother and father, the dependency case was transferred to Alameda County on June 7, 2006. On June 28, 2006, the Alameda County Superior Court accepted the transfer and appointed counsel for minor. On April 6, 2007, grandparents were granted de facto parent status.

In anticipation of the 12-month review hearing, the Agency filed a status review report on June 11, 2007, in which it recommended that minor be placed with father and continue to receive family maintenance services. On June 20, 2007, the court referred the parties to mediation to prepare for minor's transition to father's home. By consent of the parties, however, the 12-month review hearing did not actually begin until mid-November 2007, at which time it was consolidated with the permanency planning hearing mandated by Welfare and Institutions Code section 366.22, subdivision (a) (section 366.22(a)).[2] Adopting the informal term used by the parties, we will refer to this combined hearing as the 18-month review hearing. (See also, e.g., Cal. Rules of Court, rule 5.720(d).)

On August 9, 2007, shortly after minor's fifth birthday, the court authorized father to take minor to a theme park in Florida. Grandparents were opposed to the trip, although

[2] All further statutory citations are to the Welfare and Institutions Code unless otherwise noted.

they had taken minor to a related theme park in southern California, against the advice of the social worker, in late 2006. After the Florida trip, father did not return the minor by the date set by the court, and did not contact grandparents to notify them or explain the delay. Father later admitted that he had known from the start that he and the minor would not return from Florida until after the scheduled date. As a result of this incident, father and grandparents were referred to counseling with Allen Dearbourne to address their problems in communicating with one another.

The last full status report prepared by the Agency was filed on October 24, 2007, in anticipation of the 18-month review hearing, which began on November 16, 2007. The Agency also filed addendum reports in January 2008, April 2008, and twice in June 2008. In all of these reports, the Agency recommended that reunification services be terminated for both father and mother, and that the case be set for a permanency planning hearing with the goal of establishing grandparents as minor's permanent legal guardians.

The evidence at the 18-month review hearing included the testimony of father; both grandparents; father's mother; minor's therapist, Dr. Liza Hecht; and child welfare worker Jennifer Wendell. In addition, father presented the testimony of Rodney C., a friend of father's who accompanied father and minor on their trip to Florida, bringing along his own daughter, who was minor's friend.

The parties have outlined the hearing testimony in some detail in their briefs, and we need not repeat it here. Suffice it to say that Wendell and Hecht both expressed concern that returning minor to father would be detrimental to minor because her predominant attachment was to grandparents. In her later testimony, however, in February 2008, Wendell acknowledged that minor seemed to have become more comfortable with father and father's mother than she had been on prior visits that Wendell had observed. Wendell also related that Dearbourne had told her that the therapy he was doing with father and grandparents appeared to have improved their relationship, and she opined that if the adults involved handled the transition well, minor would be able to adjust to the transfer to father's custody. Hecht's testimony reinforced

that of Wendell in opining that minor's attachment to father and father's mother appeared to be increasing.

Due to the number of witnesses presented by the parties, as well as scheduling difficulties, the presentation of evidence at the 18-month review hearing did not conclude until August 15, 2008. The court then set a briefing schedule for the parties to submit written closing arguments and responses.

On October 7, 2008, after the completion of post-hearing briefing and almost a year after the original date set for the 18-month review hearing, the juvenile court judge held a hearing to announce his findings and decision in open court. The judge began by noting that although the lengthy period of time it had taken to try the case was frustrating, the delay had given the court the opportunity to observe all the parties, including father and grandparents, and to speak with and observe minor in chambers.

The judge recognized that both father and grandparents loved minor and cared for her. He also acknowledged that the transition between caregivers was "horrible and challenging" for minor, but stated that in his extensive experience as a family law lawyer and then judge, "transitions of children in any case where a child has to go back and forth between homes [are] always challenging," and indicated that for that reason, he would not make a decision "based upon what happens at transitions."

The judge also indicated that he was "not going to make [his] decision [based] on what a six-year-old wants," and explained that if the minor had her choice, she would want to live with her mother—a placement not deemed suitable by any of the parties.[3] He also indicated that Hecht had "unfortunately lost credibility with [him] in many respects . . . when she told [the court] that a six-year-old is old enough to make a decision on where she lives."

The judge recognized that the minor had lived primarily with grandparents, but noted that father had also been part of her life since shortly after she was born, and that

[3] Later in the hearing, the judge related that minor had told him her first choice was to live with her mother, and her second choice was to live with grandparents.

although grandparents' home was minor's "central place to live," she had spent significant time with father, and under the order then in effect, was living with him from Friday to Monday, "a pretty significant part of a week."

The judge went on to explain that given the procedural posture of the case, i.e., an 18-month permanency hearing, he was "at a fork in the road" and was required either to return minor to one of her parents, or begin the process of developing a permanent plan for her. Placement with mother was out of the question, because it would be detrimental to minor due to mother's "significant issues" regarding mental health, substance abuse, and anger. Thus, as the judge articulated it, "[i]n order for me not to return [minor] to [father], I have to find that it would be detrimental to [minor]" to do so.

In assessing this issue, the judge expressly found that Hecht's credibility was impaired by "some problems with . . . her impartiality." He based this finding, in part, on Hecht's testimony regarding the reasons for father's having missed various appointments with her, which he found "interesting" in that Hecht "seemed to clearly know when she was going to be meeting with the grandparents," but may have been at fault in how she set up appointments with father, and had not even tried to call him when minor was going through the crises about which Hecht had testified.

Later on in the hearing, the judge remarked on the contrast between Hecht's testimony that minor "had to have three therapy sessions to prepare" her to come to court to speak with him, and his own experience when minor actually met with him. He found minor to be "extremely bright and bubbly" as well as intelligent and perceptive, and was struck by the fact that after leaving his chambers, she wanted to come back in order to tell him that she wanted to decide when she saw her father. He also expressed concern, particularly in light of minor's transition issues, that Hecht had never observed father and minor together outside the office setting. He acknowledged, however, that Hecht had indicated that this would not have been appropriate.

The judge criticized the child welfare worker for devoting more attention to grandparents' relationship with minor than to father's. He indicated that the totality of

the evidence, including the testimony of father, father's friend, and father's mother, gave him "a different picture" than that portrayed by Hecht and the child welfare worker.

While the judge acknowledged that therapeutic testimony was important, he declined to base his decision on it entirely, noting that he was required to "look at the totality of the evidence." He indicated that the two theme park trip incidents would not play a role in his decision, because he believed "[b]oth parties have some fault in that respect." He also discounted entirely, as "time irrelevant," the Agency's April 2007 report, which indicated that father was not in full compliance with the therapy component of his case plan.

The judge found that father had "made a very good effort in being part of his daughter's life," and rejected the arguments that father was an egomaniac or a self-centered individual. He characterized father as "a father that does care about his child," and had "made a good faith effort in complying with the case plan." He declined to accept the other parties' arguments that he should discount the testimony of father's friend, who was a father himself and had spent time with father and minor. He also termed "very convincing[]" father's testimony that "things are okay" when minor is with him, once she goes through a transition time, which the judge noted was not unusual. The judge reported that when he asked minor whether she liked to visit father, she gave "some mixed answers." Minor told the judge at one point during their interview that father was "mean," but could not define what she meant, and did not give the judge any impression that she was being abused.

Based on the totality of the evidence, the judge found that it would not be detrimental to minor to return her to father. He recognized, however, that there was a need for a gradual transition, that minor had a strong bond with grandparents and that they would continue to have a role in minor's life, and that minor's schooling should not be disrupted. In order to facilitate the transition, he ordered that the family continue to receive family maintenance services. He also ordered father and grandparents to discuss with Dearbourne whether they should work the visitation issues out with her, or to be referred to mediation for that purpose.

The judge directed Hecht to begin the process of terminating her therapeutic relationship with minor, because he believed she had "lost some of her objectivity" and was "probably perceived by . . . father as biased," giving rise to a need for "a fresh start . . . as we move on to a different phase" of the proceeding. Instead, he expressed a strong desire that Dearbourne remain involved in the case to assist father and grandparents with transitions, and also ordered that minor remain in individual therapy, with the therapist remaining in contact both with father and with grandparents. He cautioned father to take the therapeutic aspect of the case seriously.

In conclusion, the judge made formal findings confirming his informal assessment of the evidence, and concluded that "the appropriate permanent plan is to place [minor] in the home of the previously noncustodial parent," i.e., father. The court continued family maintenance services, but discontinued reunification services to mother, and set the case for a progress report on January 29, 2009, and a six-month review on March 24, 2009. For the time being, the court continued the existing custody and visitation arrangement between grandparents and father, but with the direction that the parties begin working "delicately and thoughtfully" on a plan to return minor to father's custody.

DISCUSSION

The order from which this appeal was taken was issued after an 18-month review hearing. As relevant here, section 366.22(a) provides that at an 18-month review hearing, "[t]he court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker shall have the burden of establishing that detriment. . . . The failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental." (§ 366.22(a); see also Cal. Rules of Court, rule 5.720.)

" 'Absent extraordinary circumstances, the 18-month review hearing constitutes a critical juncture at which "the court must return children to their parents and thereby

achieve the goal of family preservation[,] or terminate services and proceed to devising a permanent plan for the children." [Citations.]' [Citations.]" (*Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 306-307.) At this point in the dependency process, "unless the court finds by a preponderance of the evidence that returning the child to the physical custody of his or her parents would create a substantial risk of detriment to the child's safety, protection or physical or emotional well-being, the court *must* order the child returned. [Citation.]" (*Id.* at p. 307, italics added.)

"The standard for showing detriment is 'a fairly high one. It cannot mean merely that the parent in question is less than ideal, did not benefit from the reunification services as much as we might have hoped, or seems less capable than an available foster parent or other family member.' [Citation.] Rather, the risk of detriment must be *substantial*, such that returning a child to parental custody represents some danger to the child's physical or emotional well-being. [Citations.]" (*In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1400, italics in original.) Thus, although section 366.22(a) provides that a parent's "failure . . . to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental," it does not require that the dependency court make a finding of detriment unless a parent has demonstrated 100 percent compliance with every aspect of his or her treatment plan. For example, in *Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738, 1747-1752, the court discussed the "quantum of evidence concerning a parent's personality, character and attitudes required to sustain a detriment finding" (*id.* at p. 1749), and characterized opinions by a social worker and a therapist that the mother had "not 'internalized' what she ha[d] learned in parenting classes" as "simply too vague to constitute substantial, credible evidence of detriment." (*Id.* at p. 1751.)

In short, the dependency court's task at the 18-month review hearing in this case was not to determine who was entitled to custody of minor based on the degree of father's compliance with his reunification plan. Nor was it to determine who, as between grandparents and father, would be the *better* custodian for minor. Rather, the court's task

was to determine whether the Agency had met its burden of proving that placing minor in father's custody would create a substantial risk of detriment to her emotional well-being.[4]

Moreover, as grandparents' opening brief acknowledges, our standard of review of an order returning a child to a parent following an 18-month review hearing is whether substantial evidence supports the dependency court's finding.[5] (*Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 705.) "In the presence of substantial evidence, appellate justices are without the power to reweigh conflicting evidence and alter a dependency court determination. [Citations.]" (*Ibid.*; see also *In re Stephanie M.* (1994) 7 Cal.4th 295, 319.)

Grandparents' opening brief also acknowledges that "the question whether to return a child to parental custody is dictated by the well-being of the child at the time of the review hearing." (*In re Joseph B.* (1996) 42 Cal.App.4th 890, 900.) Thus, as grandparents put it in their opening brief, "the court was required to focus on the relationship between [father] and [minor] and on the risk of emotional detriment to her at the time of the hearing as opposed to efforts made by [father]." (See *In re Cody W.* (1994) 31 Cal.App.4th 221, 225 [when assessing whether return of child to parent would be detrimental to child, "the juvenile court's focus is properly centered on the absence or breakdown of a relationship between a particular parent and a particular child"].)

Despite their acknowledgment of these principles, grandparents fail to apply them in arguing their case. Rather than focusing on the evidence supporting the dependency

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[4] Neither grandparents nor the Agency argued in the trial court, and grandparents do not argue on appeal, that placing minor with father poses any risk to her "safety, protection, or physical . . . well-being." (§ 366.22(a).) The only contested issue is the risk of psychological detriment to minor.

[5] Father's brief implies that the standard of review is abuse of discretion, citing *In re Raymundo B.* (1988) 203 Cal.App.3d 1447, 1456. That case involved the issue whether a minor in a juvenile delinquency proceeding was entitled to an interpreter, and is inapposite. Section 366.22(a) does not involve a discretionary decision by the dependency court. Rather, it requires the court to make a factual finding regarding whether there is a substantial risk of detriment if the child is returned to the parent. Once that finding is made, the next step *must* be either to return the child to the parent, or to set a hearing under section 366.26 (except in unusual circumstances not present here).

court's decision, and arguing that it is insubstantial, grandparents focus on the contrary evidence, and argue that the dependency court should have given it more weight. In addition, grandparents rely heavily on father's track record during the early portions of the reunification process, rather than on the situation as it stood when the 18-month review hearing concluded. For example, grandparents put great stress on father's asserted shortcomings in complying with his obligations under his reunification plan, particularly in regard to participation in individual therapy and joint therapy with minor, going back as far as 2006. They do not explain, however, how these shortcomings show that the evidence on which the dependency court's order was based was not substantial.

Similarly, grandparents cite cases holding that evidence similar to the facts on which they rely in this case is sufficient to justify a dependency court's finding of detriment. In all of these cases, however, the Court of Appeal *upheld* the dependency court's finding that the return of the child *would* be detrimental.[6] None of them *reversed* a dependency court's finding of *no* detriment, which is the result that grandparents are advocating here. Thus, these cases do not stand for the proposition that when evidence of the type relied upon by grandparents exists, a finding of no detriment must be reversed, regardless of whatever countervailing facts may have been shown.

In short, we have examined the record, and the dependency court judge's findings and explanation of the reasons for his order, in light of the applicable statutory standards,

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[6] See *In re Jasmon O.* (1994) 8 Cal.4th 398 [upholding order granting petition to change prior order based on minor's having developed serious psychological problems regarding transitions between homes that parent did not recognize or appreciate]; *Constance K. v. Superior Court, supra*, 61 Cal.App.4th 689 [upholding decision not to return children to mother based on opinions of mental health professionals that mother could not cope with having children in her custody and was incapable of appropriate parenting, coupled with children's loving and stable relationship with foster parents]; *In re Dustin R.* (1997) 54 Cal.App.4th 1131 [upholding finding of detriment based on evidence of parents' lack of understanding of significance of father's physical abuse and children's resulting psychological problems]; *In re Brian R.* (1991) 2 Cal.App.4th 904 [upholding decision not to return child to father, with whom child had not lived for most of child's life, based on evidence that father did not have the capacity to parent due to personality disorder].

the standard of review, and the arguments made in the parties' briefs on appeal. It is evident that the judge viewed the evidence on the issue of detriment in a different light than did grandparents. The question presented by this appeal, however, is not whether we would decide that issue differently; rather, it is whether the judge's view was supported by substantial evidence. Moreover, the judge framed his order carefully to as to minimize whatever detriment the transition to father's custody would cause, and to make it as smooth and gradual as possible. Under the circumstances, grandparents simply have not convinced us that the judge erred in concluding that substantial detriment had not been demonstrated, and that section 366.22(a) therefore required him to place minor in father's custody.

DISPOSITION

The order from which this appeal was taken is affirmed.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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SEPULVEDA, J.